UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE EMPLOYEES BARGAINING AGENT COALITION, ET AL.	:	CIVIL ACTION NO.
Plaintiffs,	:	3:03CV221 (AWT)
V.	:	
JOHN G. ROWLAND , ET AL.,	:	
Defendants.	:	FEBRUARY 24, 2003

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Pursuant to Article III of the United States Constitution, Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and Rule 9 of the Local Rules of Civil Procedure, the defendants, John G. Rowland, Governor (hereinafter "Governor"), and Marc S. Ryan, Secretary of the Office of Policy and Management (hereinafter "Secretary"), respectfully submit this Memorandum of Law in Support of their Motion to Dismiss the plaintiffs' Complaint in its entirety.

I.
PRELIMINARY STATEMENT

The people of Connecticut have elected a Governor and legislature and have entrusted them with the responsibilities of their offices. Matching the State's expenditures to its revenues is one of those responsibilities. At this time of fiscal strain, fulfilling that responsibility requires

difficult policy decisions about, for example, the type and extent of services the State will provide, the number of employees the State will maintain, and the amount of revenues the State will collect.

Making these decisions is the essence of governmental policymaking. By their request that this Court substitute itself for the decisionmakers elected by the people of Connecticut, plaintiffs challenge the right and obligation of Connecticut's duly elected legislative and executive branch leaders to determine the state's fiscal and programmatic priorities. The very essence of the Complaint is an attack on the fiscal choices made by the Governor when he weighed various policy options and decided to conduct layoffs, rather than pursue other means of addressing a budget crisis. The plaintiffs defiantly ask this Court to weigh the policy options differently and achieve a result more favorable to them. They thus ask this Court to step out of its judicial role and into a function that is fundamentally and inescapably political.

Plaintiffs' request that this Court displace the Governor must be rejected because it is inconsistent with the role of the court and the structure of our constitutional system. The Complaint should be dismissed and the plaintiffs should be remanded to the political fora where the decisions at issue here must properly be made.

II.
SUMMARY OF ARGUMENT

As set forth below in more detail, the Complaint should be dismissed in its entirety for lack of a justiciable controversy, for lack of subject matter jurisdiction, or for failure to state a claim upon which relief may be granted. Art. III, U.S. Const.; Fed. R. Civ. P. 12(b)(1) and (6).

The plaintiffs are: State Employees Bargaining Agent Coalition ("SEBAC"), on its own behalf and on behalf of the members of its constituent unions ("SEBAC Class"); the thirteen unions ("Union Plaintiffs") that comprise SEBAC, on their own behalf and on behalf of their members; and five individual laid-off state employees, Denise A. Bouffard, Geneva M. Hedgecock, Dennis P. Heffernan, William D. Hill, and Marcelle Y. Pichanick (the "Named Plaintiffs"), who purport to represent other union members affected by the layoffs (the "Union Members Class").[1]

The defendants are: John G. Rowland, Governor of Connecticut, in both his individual and official capacities; and Marc S. Ryan, Secretary of the Office of Policy and Management ("OPM"), in both his individual and official capacities. The defendants seek dismissal on the following grounds:

[1] The defendants oppose the assertion of any putative class-based claims and will object to any attempt by the plaintiffs to seek class certification, either as the so-called SEBAC Class or the so-called Union Members Class.

- All ten counts of the Complaint present nonjusticiable political questions that this Court has no power to adjudicate;
- All ten counts of the Complaint are barred by the Eleventh Amendment, because the lawsuit is in fact against the state itself, despite its having been pleaded only against the Governor and the Secretary, or, in the alternative, Counts One, Two, Three, Four, Five, Six, Nine and Ten are barred by the Eleventh Amendment because they seek monetary damages against the state;
- All ten counts of the Complaint are barred by absolute legislative immunity, because the challenged acts of the defendants were quintessentially legislative in nature and do not lend themselves to judicial resolution;
- Counts One, Two, Three and Four are barred by qualified immunity, because the defendants' challenged conduct was objectively reasonable;
- Counts One and Five should be dismissed for failure to allege several required elements of a First Amendment claim;
- Counts Two and Six fail to allege any constitutionally protected conduct by the plaintiffs that led to their layoffs and accordingly do not state a First Amendment claim;
- Counts Three and Four should be dismissed because SEBAC and the unions bringing those claims have no standing to do so; and

- Counts Nine and Ten identify no protected property interest, and the substantive due process claims, therefore, fail.

III.
FACTUAL ALLEGATIONS

For purposes of this Motion to Dismiss, the Federal Rules of Civil Procedure require the defendants to take the allegations of the Complaint as true. Nevertheless, the defendants can and do refer to public documents, the collective bargaining agreements to which the Complaint expressly refers, and newspaper articles to provide additional factual context.[2]

Connecticut, which has a constitutional mandate to balance its budget,[3] faced a budget crisis in 2002 and looked aggressively for budgetary savings. (E.g., Complaint, ¶¶ 53-57, 61;

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[2] See Kramer v. Time Warner, Inc., 937 F.2d 767, 769 (2d Cir. 1991) (recognizing the practice of taking judicial notice of public documents on motions to dismiss as routine); Cortec Indus., Inc. v. Dubin Clark & Co., 949 F.2d 42, 48 (2d Cir. 1991) ("[w]here plaintiff has actual notice of all the information in the [defendant]'s papers and has relied upon these documents in framing the complaint," then court can consider such documents even though the plaintiff has not included them as exhibits to the complaint or incorporated them by reference therein).

[3] Conn. Const. Art. III, § 18(a), as adopted in Article XXVIII of the amendments (constitutional balanced budget requirement: "The amount of general budget expenditures authorized for any fiscal year shall not exceed the estimated amount of revenue for such fiscal year."); see also Conn. Const. Art. III, § 18(b), as adopted in Article XXVIII of the amendments (constitutional spending cap: "The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the governor declares an emergency or the existence of extraordinary circumstances and at least three-fifths of the members

Memorandum from Marc S. Ryan dated November 18, 2002 (cited in Complaint, ¶ 54(c); copy attached as Ex. A.)) The General Assembly, in approving a balanced budget in late June 2002, changed state law to define the Governor's authority as including extraordinary rescission authority, in combination with the Governor's other constitutional and statutory authority. (Public Act No. 02-1, May Spec. Sess., §52 (copy attached as Ex. B).) In November 2002, the defendants sought concessions from the state employees' unions, and, when the concession negotiations failed,[4] the defendants ordered layoffs of state union employees. (Complaint, ¶¶ 48-51.)

The state of Connecticut has approximately 45,000 union employees. (Complaint, ¶ 3.) Those employees are represented by 13 unions ("Union Plaintiffs"), which in turn comprise a coalition called State Employees Bargaining Agent Coalition ("SEBAC"). (Complaint, ¶¶ 3-16.) SEBAC is the exclusive bargaining agent of the Union Plaintiffs for the purpose of negotiating and entering collective bargaining agreements regarding health care, pension and other benefits for members of the Union Plaintiffs. (Complaint, ¶ 35.) Each of the Union Plaintiffs also has entered

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of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances….").

[4] Also as a result of failure of concession negotiations, the existing collective bargaining agreements remain in force, and more than 25,000 Union members received pay increases less than a week before the plaintiffs filed this lawsuit. Those increases are worth nearly $25 million per year. (Some State Workers Get Scheduled Raises, Hartford Courant, Jan. 31, 2003, at B7, copy attached as Ex. C.) By contrast, a wage freeze and a hiring freeze have been imposed on non-union state employees. (E.g. Public Act No. 02-1, May Spec. Sess., §19, copy attached as Ex. B.)

into a collective bargaining agreement with the state on behalf of its members. (Complaint, ¶¶ 38-39.) Those agreements include a statement of management rights, such as:

> [T]he State reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of public management. Such rights include but are not limited to … determining the mission of an agency and the methods and means necessary to fulfill that mission, including the contracting out of or the discontinuation of services, positions or programs in whole or in part; … the suspension, demotion, discharge or any other appropriate action against its employees; [and] the relief from duty of its employees because of lack of work or for other legitimate reasons.

(E.g., Collective Bargaining Agreement between State and CEUI for Maintenance and Service Unit (NP-2), Art. 5, Sec. 1, copy attached as Ex. D.) In addition, the collective bargaining agreements expressly contemplate and provide the Governor with authority to conduct layoffs of union members. (E.g., id. at Art. 13.)[5]

Just as significant as what the plaintiffs allege in the Complaint is what they do not allege. The plaintiffs fail to allege, nor could they allege, that the Governor directed the termination of any particular individual; the plaintiffs fail to allege, nor could they allege, that a budget crisis did not in fact exist in Connecticut or that no action was needed to resolve such crisis; and, finally, the plaintiffs fail to allege, nor could they allege, that the Governor lacks constitutional or statutory

[5] To the extent union members seek to challenge the layoffs' compliance with the applicable provisions of the collective bargaining agreements, they can file grievances. (E.g., Collective Bargaining Agreement between State and CEUI for Maintenance and Service Unit (NP-2), Art. 16, copy attached as Ex. D.)

power to address such a budget crisis or to make difficult policy decisions about how to address such a crisis. For the reasons set forth below, the Complaint must be dismissed.

IV.
ARGUMENT

A. Legal Standard

The purpose of a motion to dismiss under Rule 12(b)(1) or 12(b)(6) is "to assess the legal feasibility of the complaint." Bartolini v. Ashcroft, 226 F. Supp. 2d 350, 353 (D. Conn. 2002); see also Ryder Energy Distrib. Corp. v. Merrill Lynch Commodities, Inc., 748 F.2d 774, 779 (2d Cir. 1984). Dismissal is warranted if, under any set of facts that the plaintiffs can prove consistent with the allegations, it is clear that no relief can be granted. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Frasier v. General Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991). "The standards for reviewing dismissals granted under 12(b)(1) and 12(b)(6) are identical." Moore v. PaineWebber Inc., 189 F.3d 165, 169 n.3 (2d Cir. 1999).

To survive a motion to dismiss, a complaint must state the claims and the basis for them with a level of specificity sufficient to provide the defendant fair notice and show that the substance of the claims is sufficient to proceed to the introduction of evidence. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. 41, 47 (1957). The Federal Rules do not allow the substitution of conclusory statements "for minimally sufficient factual allegations." Furlong v. Long Island College Hosp., 710 F.2d 922, 927 (2d Cir. 1983). "In

practice ‘a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.’” Telstat v. Entertainment & Sports Programming Network, 753 F. Supp. 109, 111 (S.D.N.Y. 1990)(citation omitted).

In reviewing the justiciability of this lawsuit, the Court is not bound by the four corners of the Complaint. Parties seeking the exercise of federal jurisdiction have the burden "clearly to allege facts demonstrating that [they are] a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Warth v. Seldin, 422 U.S. 490, 518 (1975); Thompson v. County of Franklin, 15 F.3d 245, 249 (2d Cir. 1994) (concerning dismissal based on standing, which is another component of justiciability).

B. Plaintiffs’ Complaint Improperly Invites This Court To Entertain Nonjusticiable Political Questions And Should Be Dismissed

This Court should dismiss the Complaint in its entirety because the claims asserted are simply a political ploy in a political battle involving the executive and legislative branches of the Connecticut state government, born of the plaintiffs’ hope to exert influence on those branches of government. The political nature of the dispute at hand is demonstrated most recently by the fact that the Connecticut legislature voted, just days after this lawsuit was filed, to reinstate the laid-off state workers, in a bill that the Governor promptly vetoed. (See No Surprise: No Dice, Hartford Courant, Feb. 20, 2003, at A1, copy attached at Ex. E.)

1. *Applicability of the Political Question Doctrine*

Federal courts have long eschewed involvement in uniquely political issues. In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court explored at length the contours of the political question doctrine, by which certain disputes are nonjusticiable under Article III of the United States Constitution. The Baker Court held that a nonjusticiable political question is one that, inter alia, "lack[s] judicially discoverable and manageable standards for resolving it [or involves] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." 369 U.S. at 217.[6]

The doctrine has been applied in such disparate cases as where, for example, the Governor of Ohio's use of the National Guard at Kent State was challenged as, inter alia, a First Amendment violation, Gilligan v. Morgan, 413 U.S. 1 (1973), and where New York landlords sought to recover unpaid rent for offices leased to the former Socialist Federal Republic of Yugoslavia, by asking the court to apportion public debt among sovereigns, 767 Third Avenue Associates v. Consulate General of Socialist Federal Republic of Yugoslavia, 218 F.3d 152 (2d Cir. 2000). The common thread among cases that involve a nonjusticiable political question is that the federal court is not suited to resolve, and is incapable of resolving, the parties' nonjudicial, political dispute.

The existence of even one of the Baker factors warrants a finding of nonjusticiability. In 767 Third Avenue Associates, 218 F.3d at 158, the Second Circuit approved the district court's

[6] Baker identified several additional indicia of a nonjusticiable federal question.

"primar[y]" reliance on the "lack of judicially recognizable standards" in dismissing the matter as a nonjusticiable political question. The Second Circuit reached this result even though the political question at hand did not directly involve the executive and/or legislative branch of the federal government, but the government of a distinct sovereign, the former Yugoslav Republic, and the successors thereto. Id.

The Connecticut Supreme Court too has applied the political question doctrine where a constitutional violation is alleged but resolution of the issue would conflict with the state's basic principle of separation of powers. In Pellegrino v. O'Neill, 193 Conn. 670, 480 A.2d 476 (1984), the Court rejected the plaintiffs' attempt to seek judicial resolution of the alleged unconstitutionally inadequate number of state court judges. The court, relying on the Baker v. Carr test for justiciability, held that there was a "lack of judicially discoverable and manageable standards" to apply to this constitutional challenge, because the allegedly inadequate number of judges could be addressed by any number of different approaches: appointment of additional judges, adoption of new limits on litigation, and others. The court refused the plaintiffs' invitation to weigh in on this question of policy, which is within the power and responsibility of the legislative branch of government. Pellegrino, 193 Conn. at 681-82; see also Nielsen v. State, 236 Conn. 1, 7-8, 670 A.2d 1288 (1996) (relying on Baker v. Carr test to find nonjusticiable political question in plaintiffs' suit challenging General Assembly's failure to define certain terms used in state constitutional amendment adopting spending cap).

2. *The Plaintiffs' Claims Raise Nonjusticiable Political Questions That Must Be Left to the Connecticut Executive and Legislative Branches for Resolution*

This case is not one that merely has political overtones; it is a case that arises from and must be resolved within the legislative and executive branches of the Connecticut state government. The plaintiffs' claims – generally stated, that the Governor and Secretary Ryan violated the First, Fifth and Fourteenth Amendments when they sought to address the state's budget crisis by laying off unionized state employees rather than adopting alternative proposed savings measures, such as those suggested by the Comptroller and Secretary of State (Complaint, ¶53) – do not lend themselves to judicial standards for analysis and decision, nor is it possible for this Court to decide the issues without making an initial, nonjudicial policy determination.

Indeed, in weighing the validity of the defendants' budgetary decisions, this Court would have to assess, at the very least, both the extent of the State's need to make spending cuts and the competing considerations of where, when and how to make such cuts. (See, e.g., Complaint, ¶¶ 53-57.) The Court would have to determine, in plaintiffs' words, whether the Governor "refused to select and implement available alternatives to the lay-offs as a means of closing the asserted budget gap." (Complaint, ¶ 61.) To do so, the Court would have to decide which set of value choices implicit in various possible courses of action is "correct". Similarly, the Court would have to adjudicate the validity of the Governor's policy decision that reducing the number of state police officers would be contrary to the public interest. (Complaint, ¶¶ 69, 70.) Such assessments would require this Court to substitute itself for either the Connecticut General Assembly and/or the

Governor and usurp their constitutional roles in governing the state. In sum, no judicially manageable standards exist for measuring the validity of such a quintessentially governmental exercise of power, because such validity would rest not on any legal principle, but on comportment with adopted fiscal and other policies. See 767 Third Avenue Associates, 218 F.3d at 161 (holding that no judicially manageable standards exist for resolving foreign states' liability, because no rule of law is available to guide court in making equitable distribution of public debt of foreign state).

Moreover, if the Court were to embark on such an assessment of the validity of the Governor's budget strategy, it would necessarily have to predicate its assessment on a policy determination, such as that correcting the state's fiscal condition is (or is not) paramount over particular programmatic consequences, or that geographic dispersion of the effects of the layoffs is (or is not) desirable, or, perhaps most fundamentally, that layoffs of state union employees are (or are not) to be avoided at all costs. All such weighing of competing considerations is firmly within the responsibility and competence of the state's elected executive and legislative branches, and thoroughly outside the scope of that which the federal judiciary can or should manage or decide.

The Complaint seeks judicial resolution of that which is nonjudicial, and this Court cannot, therefore, consistent with its role pursuant to Article III, address plaintiffs' claims. The Complaint should be dismissed.

C. The Supreme Court's Opinion In Bogan v. Scott-Harris Compels Dismissal Of The Complaint On The Basis Of Legislative Immunity

The Governor's actions in laying off state employees to achieve budgetary savings were an exercise of the Governor's constitutional and statutory authority and were legislative in nature.[7] Accordingly, those actions are protected by absolute legislative immunity, and all of the plaintiffs' claims must be dismissed.

In Bogan v. Scott-Harris, 523 U.S. 44 (1998), a city administrator claimed that the city eliminated her one-person department from the budget because of racial discrimination and in retaliation for her exercise of her First Amendment right to criticize city officials. A jury found for her on her First Amendment claim, and the First Circuit affirmed the judgment against the city's mayor and council president. The Supreme Court reversed, holding that the officials' actions were legislative and were therefore entitled to absolute immunity. As Bogan explains, legislative immunity is grounded on the recognition that "[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." Id. at 52.[8]

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[7] The term "legislative", as used herein, means not "of the legislature" but rather means discretionary, policymaking, implicating budgetary priorities, and having prospective implications. Bogan v. Scott-Harris, 523 U.S. 44, 51-56 (1998). "Legislative" acts are thus distinguished from ministerial or administrative acts. Id.

[8] The Court follows the quoted statement with a reference to Spallone v. United States, 493 U.S. 265, 279 (1990), which it describes as "noting, in the context of addressing local legislative

After stating the rule that "[a]bsolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity,'" id., 523 U.S. at 54 (citing Tenney v. Brandhove, 341 U.S. 367, 376 (1951)), the Bogan Court analyzed whether the officials were entitled to immunity. The First Circuit, as the Supreme Court noted, had held that the actions were not protected by legislative immunity because they were specifically targeted at the plaintiff. This reasoning, the Supreme Court concluded, "erroneously relied on [the officials'] subjective intent in resolving the logically prior question of whether their acts were legislative." Id. That question depends solely "on the nature of the act, rather than on the motive or intent of the official performing it." Id.

Proceeding then to examine that "logically prior question," the Supreme Court held that the mayor's action in introducing and signing the budget ordinance and the council president's action in voting for it were entitled to immunity. Id. at 55. The Supreme Court did not decide, however, whether the fact that the actions were "formally legislative" sufficed to trigger immunity because "the ordinance, in substance, bore all the hallmarks of traditional legislation." Id. As the Supreme Court explained:

> [The ordinance] reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, "in eliminating [plaintiff's department], certainly governed 'in a field where legislators traditionally

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action, that 'any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process.'" Bogan, 523 U.S. at 52.

> have power to act.'" [citation omitted]. Thus, petitioners' activities were undoubtedly legislative.

Id. at 55-56.

The Courts of Appeals have followed Bogan's functional analysis. See, e.g., Bryan v. City of Madison, 213 F.3d 267, 272 (5th Cir. 2000) ("Absolute immunity applies to activities, not offices" and "protects officials fulfilling legislative functions even if they are not 'legislators'"); Gallas v. Supreme Court of Pennsylvania, 211 F.3d 760, 773 (3d Cir. 2000) ("In determining whether an official is entitled to legislative immunity, we must focus on the nature of the official's action rather than the official's motive or the title of his or her office"); cf. Carlos v. Santos, 123 F.3d 61, 66 (2d Cir. 1997) (pre-Bogan decision holding that doctrine of absolute legislative immunity applies to local legislators and applying "a 'functional approach,' looking to the function being performed rather than to the office or identity of the defendant" to decide whether immunity obtains).

Applying the functional analysis to this case, there is no question that the Governor and the Secretary undertook acts that were legislative rather than ministerial when cutting approximately 3000 positions from the State payroll (Complaint, ¶51) as a means of addressing the budget crisis. Connecticut's constitutional and statutory framework reflect that the Governor[9] has significant

[9] The statutory framework makes clear that the Secretary has an important role in assisting the Governor with, inter alia, the budget. E.g., Conn. Gen. Stat. § 4-38c, 65a (OPM is an executive branch agency that has responsibility for "all aspects of state staff planning and analysis in the areas of budgeting, management, [and others]"); § 70b(a) (OPM shall "assist the Governor in his

power and obligations related to the state budget and spending. For example, the Governor has responsibility, with assistance from OPM, for creating and transmitting, at designated intervals, a budget containing a financial program for a two-year period. Conn. Gen. Stat. §§ 4-70b, 71. The Governor further has authority to modify any allotments of funds, or allotment requisitions, as he deems necessary.[10] Such modification is to be predicated on a determination by the Governor that "due to a change in circumstances since the budget was adopted certain reductions should be made in allotment requisitions or allotments in force or that estimated budget resources during the fiscal year will be insufficient to finance all appropriations in full." Conn. Gen. Stat. § 4-85(b). In June 2002, the General Assembly passed additional legislation, effective July 1, 2002, defining the Governor's extraordinary rescission authority. (See Public Act No. 02-1, May Spec. Sess., §52(a); see also Public Act No. 02-1, May Spec. Sess., §52(b) (expressly contemplating that Governor would order reductions to allotments "to prevent a deficit") (copies attached as Ex. B).)

In exercising his constitutional and statutory authority related to budgeting and spending, the Governor acted in a manner fully consistent with Bogan's definition of actions that are

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duties respecting the investigation, supervision and coordination of the expenditures and *other fiscal operations of such budgeted agencies*") (emphasis added).

[10] The Connecticut Constitution imposes an affirmative obligation to match expenditures to revenues (Conn. Const. Art. III, § 18(a), as adopted in Article XXVIII of the amendments), and also imposes a spending cap that forbids state spending from being increased beyond a certain amount, regardless of the state's revenues (Conn. Const. Art. III, § 18(b), as adopted in Article XXVIII of the amendments).

substantively legislative. He made "discretionary, policymaking decision[s] implicating the budgetary priorities of the [state] and the services the [state] provides to its constituents." Bogan, 523 U.S. at 55-56. His actions "involved the termination of [] position[s], which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant[s] of the office." Id.[11] Finally, "in eliminating [positions], [the Governor] certainly governed 'in a field where legislators [and the Governor] traditionally have [a shared power] to act.'" Id. "Thus, [the Governor's activities] were undoubtedly legislative." Id.

In the words of the Seventh Circuit, directly applicable here,

> Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one. . . .[T]he defendants here did not fire the plaintiffs, but rather eliminated their jobs from the [state] budget. . . . Employment decisions are not administrative when accomplished through traditional legislative functions. **They are not 'employment decisions' at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct.**

Rateree v. Rockett, 852 F.2d 946, 950-51 (7th Cir. 1988) (emphasis added); see also Orange v. Cty. of Suffolk, 830 F. Supp. 701, 705 (E.D.N.Y. 1993) (holding that when a governing body, as a

[11] Plaintiffs do not allege that the Governor knew the identities of any individuals to be laid off or directed that certain identified individuals be laid off. Indeed, the plaintiffs allege just the opposite; for example, they claim "defendants further ordered the elimination of entire classifications of state employment." (Complaint, ¶ 54(b).)

part of its budget or policy-making process, eliminates a "series of positions", its members may be protected by absolute legislative immunity).

The public policy choices the Governor makes to fulfill his constitutional and statutory obligations to balance Connecticut's budget cannot be questioned in this Court. This Court must find that absolute immunity applies to the defendants' actions, and the Complaint must be dismissed in its entirety.[12]

D. Eleventh Amendment Sovereign Immunity Bars Plaintiffs' Claims

1. *The Scope of Sovereign Immunity*

The Eleventh Amendment[13] to the Constitution shields a state from suits in federal court in the absence of waiver of that protection or consent to suit. Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89, 98 (1984). This principle of sovereign immunity is founded on the recognition that federalism prohibits one sovereign from being required to appear in the courts of another sovereign. Pennhurst, 465 U.S. at 100.

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[12] To the extent that this Court deems Connecticut law to be unsettled with respect to the obligations and responsibilities imposed on the Governor by the constitutional and statutory framework cited above, the defendants urge certification of such issues to the Connecticut Supreme Court for resolution. See Conn. Gen. Stat. §51-199b.

[13] The Eleventh Amendment to the U.S. Constitution states that "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Amendment has been interpreted also to bar a suit brought a citizen against his or her own state. Hans v. Louisiana, 134 U.S. 1 (1890).

2. *The Ex parte Young Exception to Sovereign Immunity Does Not Apply In This Case*

No one would suggest that this lawsuit against two state officials asking for the state to be forced to change its conduct with regard to 45,000 of its employees is not, in fact, a suit against the state of Connecticut. Accordingly, it would be barred by the Eleventh Amendment, as construed by the Supreme Court, were it not for "the exception [the] Court has recognized for certain suits seeking declaratory and injunctive relief against state officers in their individual capacities. See Ex parte Young, 209 U.S. 123 (1908)." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 269 (1997) ("Coeur d'Alene Tribe"). Plaintiffs' assertion that this Court has subject matter jurisdiction over their claims presumably relies on that exception.

As the Supreme Court warned in Coeur d'Alene Tribe, however, allowing every action against an officer for declaratory and injunctive relief to proceed in federal court "would be to adhere to an empty formalism and to undermine the principle . . . that Eleventh Amendment immunity represents a real limitation on a federal court's federal-question jurisdiction." Id. at 270. In order to give full recognition to the principle of Eleventh Amendment immunity, which is but a "convenient shorthand" for the sovereignty of the states that is fundamental to our constitutional structure, see Alden v. Maine, 527 U.S. 706, 713 (1999), federal courts must refrain from asserting jurisdiction over suits asserting jurisdiction under Ex parte Young that impact on the "special sovereignty interests" of a state. Coeur d'Alene Tribe, 521 U.S. at 456, 456-59. This is such a suit.

If plaintiffs prevail, the size, composition, and functions of the state's work force will be determined by this Court, not by the Governor elected by the people of Connecticut. If plaintiffs prevail, the Governor's judgments as to how to address a budget crisis will be overridden by this Court's own notions of how a state government should be run. If plaintiffs prevail, the state's elected leadership will be precluded from exercising their own discretion, which the people of Connecticut elected to do, about the relative importance of different state functions performed by different groups of employees. In short, the state's ability to manage its fiscal crisis and its workforce will be substantially curtailed. But as the United States Supreme Court has recognized, the power to control its fiscal policies is at the core of the state's sovereignty:

> Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process. . . . If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

Alden v. Maine, 527 U.S. at 751.

The fundamental structure of the Constitution requires that the Complaint be dismissed.

3. *Even If Ex parte Young Were Applicable, Plaintiffs' Claims Against the Defendants for Retrospective Pay and Benefits Are Barred By The Eleventh Amendment*

Plaintiffs seek, in eight of the ten counts pled in the Complaint, relief that includes "monetary damages" or restoration of "full and uninterrupted seniority and benefits." (Complaint, Count One, ¶ 86; Count Two, ¶ 86; Count Three, ¶ 86; Count Four, ¶ 86; Count Five, ¶ 86; Count

Six, ¶ 85; Count Nine, ¶ 91; and Count Ten, ¶ 87.) These claims are barred because the Eleventh Amendment prohibits such relief from being awarded against state officials.

If a federal action is brought against state officials alone, the court must decide whether the suit is, in fact, against a state in order to decide whether sovereign immunity applies. In such cases, the court must determine whether "the state is the real, substantial party in interest." Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459, 464 (1945). Where a federal constitutional violation is alleged, the suit may proceed against individual state officials as long as the only relief sought is prospective injunctive relief. Edelman v. Jordan, 415 U.S. 651, 666-67 (1974); Ex parte Young, 209 U.S. 123 (1908). Moreover, although claims against state officials in their individual capacities are deemed not to be barred by the Eleventh Amendment, those claims may seek only monetary damages *other* than back pay and benefits. Dwyer v. Regan, 777 F.2d 825, 836 (2d Cir. 1985), modified, 793 F.2d 457 (2d Cir. 1986). Indeed, requests for back pay and retroactive benefits, however they may be pled, are claims peculiarly against the state as employer, because state officials do not personally have any duty to pay or provide benefits to state employees. DeLoreto v. Ment, 944 F. Supp. 1023, 1031-32 & n.5 (D. Conn. 1996).

In Counts One, Two, Three and Four, plaintiffs sue the Governor and the Secretary in their individual capacities, seeking relief including "monetary damages." To the extent plaintiffs thereby seek back pay, back benefits, or any other "monetary damages" that are a function only of

their employment by the state of Connecticut, or termination thereof, those claims for relief are barred by the Eleventh Amendment. DeLoreto, 944 F. Supp. at 1031-32 & n.5.

Moreover, in Counts Five, Six, Nine and Ten, plaintiffs seek restoration of "full and uninterrupted seniority and benefits" against the defendants in their official capacities. This claim for damages, seeking an award of the lost seniority credit and other employee benefits lost after and as a result of the challenged layoffs, is in essence a request for retrospective damages against the state of Connecticut, because it seeks from the defendants in their official capacities, recovery for benefits lost from the time of the layoff to the present. The Eleventh Amendment bars recovery for retrospective losses. Edelman, 415 U.S. at 663-64 (relief seeking "accrued" money damages is barred); see also Milliken v. Bradley, 433 U.S. 267, 289 (1977) (interpreting Edelman as permitting remedy to require payment of state funds only for *future* compliance with constitutional standard). Accordingly, Counts One, Two, Three, Four, Five, Six, Nine and Ten should be dismissed.

E. Qualified Immunity Bars Plaintiffs' Claims Against Defendants In Their Individual Capacities

Even if the defendants' conduct is not protected from suit by an absolute immunity, Counts One, Two, Three and Four (the "individual capacity claims") are nonetheless barred by the doctrine of qualified immunity and, therefore, should be dismissed.

1. *The Scope of Qualified Immunity*

In a § 1983 action, a state official sued in his individual capacity is entitled to qualified immunity if (1) his challenged conduct does not violate clearly established constitutional or statutory rights of which a reasonable person would have known, or (2) even though the rights were clearly established, it was objectively reasonable for the official to believe that his acts did not violate those rights. Anderson v. Creighton, 483 U.S. 635, 638 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Patel v. Searles, 305 F.3d 130, 135 (2d Cir. 2002). The defense of qualified immunity prevents "bare allegations of malice [from] subject[ing] government officials [who perform discretionary functions] either to the costs of trial or to the burdens of broad-reaching discovery." Harlow, 457 U.S. at 817-18. The test is an objective one; it does not require or permit any inquiry into the state official's subjective state of mind, but focuses only on the objective reasonableness of his conduct. Crawford-El v. Britton, 523 U.S. 574, 588 (1998).

2. *The Defendants' Conduct Was Objectively Reasonable*

Qualified immunity protects the Governor and the Secretary from suit because it was objectively reasonable for them to believe that their actions, in laying off unionized state employees, were in furtherance of their constitutional and statutory duties and did not violate the First Amendment. Indeed, the defendants undertook the layoffs in compliance not only with applicable collective bargaining agreements but also with state statutes and constitutional provisions concerning fiscal control of the state government operations.

First, the Union Plaintiffs' collective bargaining agreements provide for layoffs, specifying applicable procedures, available bases for layoff, bumping and reemployment rights, and other such indicators that layoffs were contemplated as a possibility by both parties to the collective bargaining agreements. (E.g., Collective Bargaining Agreement between State and CEUI for Maintenance and Service Unit (NP-2), Art. 13, attached as Ex. D.) In light of that clear contractual authority for conducting layoffs, the defendants' actions in ordering layoffs were wholly reasonable.

Second, the constitutional and statutory provisions cited in Section C above clearly provide that the Governor, with assistance from the Secretary, in the exercise of discretion and constitutional powers may take action to reduce spending when necessary and that such reductions are to be made based on the Governor's own determination of what is reasonable and appropriate. The power -- reflected in Public Act No. 02-1, May Spec. Sess., §§52(a), (b) (attached as Ex. B) -- to "determine [whether] a fiscal exigency" exists and to take appropriate action in response thereto, makes the Governor's decision to conduct layoffs all the more objectively reasonable. Indeed, the Governor is constitutionally and statutorily invested with the power, and the obligation, to address a budget crisis in the way that he determines is appropriate, and his exercise of such power cannot be attacked as objectively unreasonable.

Given these sound bases for conducting layoffs of state union employees in the face of a budget crisis, the defendants' actions were objectively reasonable, and qualified immunity applies to bar the individual capacity claims in Counts One, Two, Three and Four.

F. Freedom Of Speech And Association Claims By Named Plaintiffs And Union Members Class Must Be Dismissed

In the First and Fifth Counts, the Named Plaintiffs and Union Members Class allege that the defendants violated their rights of freedom of speech and freedom of association as guaranteed by the First Amendment. These claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) because they fail to state a cognizable claim under federal law.

1. *Alleged Freedom of Speech Violations*

To state a free speech claim under the First Amendment, a public employee must show that (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him. Hale v. Moss, 219 F.3d 67, 70 (2d Cir. 1999); Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999); see also Connick v. Myers, 461 U.S. 138, 140 (1983); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Hankard v. Town of Avon, 126 F.3d 418 (2d Cir. 1997).

To be constitutionally protected, the speech must relate to a matter of "public concern," which is an issue of law for the court to determine as an initial matter. Hale, 219 F.3d at 70. "'When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude . . .

without intrusive oversight by the judiciary.'" Lewis v. Cowen, 165 F.3d 154, 161 (2d Cir. 1999) (quoting Connick, 461 U.S. at 146.) Thus, if the employee is merely speaking "as an employee upon matters only of personal interest[,]" his speech is not subject to First Amendment protection. Connick, 461 U.S. at 147.

Here, the Named Plaintiffs and the Union Members Class fail to allege either that they made any statements that resulted in their termination or that they made any statements about matters of public concern. Indeed, other than being identified as a "Named Plaintiff" in the Complaint, those so identified provide no details regarding their employment or the circumstances surrounding their termination. There are no allegations surrounding the speech allegedly made by these Named Plaintiffs, nor any allegations that such speech related to matters of "public concern." Moreover, there are no allegations that the defendants terminated the Named Plaintiffs' employment *because of* any speech by the Named Plaintiffs. Plaintiffs must make specific allegations that indicate a deprivation of constitutional rights; general, indirect and conclusory allegations are not sufficient. See Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir. 1987); Koch v. Yunich, 533 F.2d 80, 85 (2d Cir. 1976).

2. *Alleged Freedom of Association Violations*

To the extent that they have alleged that their freedom of association as guaranteed by the First Amendment has been abridged, the claims of Named Plaintiffs and the Union Members Class must also be dismissed because no facts have been alleged that support such a claim. Indeed, there

are no facts to support the alleged reason for these individuals' layoffs, leaving a purely conclusory allegation that their relationship to the Union Plaintiffs led to their layoff. (Complaint, ¶¶ 71, 83.) Again, general, indirect, and conclusory allegations of a deprivation of constitutional rights are insufficient to establish a violation, and the Second Circuit has specifically required that freedom of association claims allege that the interference with associational rights be "direct and substantial" or "significant." Fighting Finest, Inc. v. Bratton, 1996 U.S. App. LEXIS 28748, at *8-9 (2d Cir. 1996) (citing Younger v. Harris, 401 U.S. 37, 51 (1971) ("The existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action.")).

In the absence of any allegation by the Named Plaintiffs that warrants invocation of the First Amendment, this Court should dismiss the Named Plaintiffs' freedom of speech and association claims in Counts One and Five.[14]

G. Counts Two And Six Alleging A Violation Of The Right To Support Political Candidates Must Also Be Dismissed

In the Second and Sixth Counts, the Named Plaintiffs and Union Members Class claim that they were terminated in violation of their right to support political candidates of their own choosing. However, the Named Plaintiffs fail to allege that, in the 2002 gubernatorial election,

[14] Upon dismissal of the Named Plaintiffs' claims, and in the resulting absence of any class representatives, the Union Members Class claims must also be dismissed. See Fed. R. Civ. P. 23 (class action requires class representatives).

they actually supported any particular candidate, much less that they supported a candidate other than the Governor, and they fail to allege that they were terminated for any such support. Moreover, the Named Plaintiffs fail to allege that the defendants ordered them to be laid off because of their political preferences. Without these allegations, there is no claim upon which relief may be granted, and Counts Two and Six must be dismissed.[15]

H. The Third And Fourth Counts Must Be Dismissed For Lack Of Standing

In the Third and Fourth Counts, which seek monetary relief against the defendants in their individual capacities, SEBAC, the SEBAC Class and the Union Plaintiffs claim that their First Amendment rights to organize and to support political candidates have been violated. There is no doubt that the First Amendment protects the rights of employees to associate and participate in labor unions. Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464 (1979). Nevertheless, the Union Plaintiffs may not bring § 1983 claims for monetary damages for harms suffered by their members because SEBAC and the Union Plaintiffs lack standing to pursue those claims.

It is well established in the Second Circuit that an organization does not have standing to seek monetary damages under § 1983 for alleged violations of its members' rights. Aguayo v. Richardson, 473 F.2d 1090, 1099 (2d Cir. 1973) (neither the language nor history of Section 1983

[15] Because the claims of the Named Plaintiffs must be dismissed for failure to state a claim upon which relief may be granted, so too do the Union Members Class claims fail, for lack of any class representative. See note 14, above.

"suggests that an organization may sue under the Civil Rights Act for the violation of rights of members."); League of Women Voters v. Nassau County Bd. Of Supervisors, 737 F.2d 155, 160 (2d Cir. 1984) ("This Circuit has restricted organizational standing under § 1983 by interpreting the rights it secures to be personal to those purportedly injured.") Thus, § 1983 is available only to those persons purportedly injured by unconstitutional conduct, and unions do not have standing to seek compensatory damages for injuries they have not suffered.

In Legal Aid Soc'y v. City of New York, 114 F. Supp. 2d 204 (S. D. N. Y. 2000), the Court held that an organization had no statutory standing to seek damages "for injuries that are purely derivative of harms suffered" by its members because the Second Circuit requires individualized proof of damages in actions under § 1983. Here, SEBAC and the Union Plaintiffs are trying to do just that. However, they have no standing to do so, and, therefore, SEBAC and the Union Plaintiffs' claims in Counts Three and Four should be dismissed.

Moreover, to the extent that SEBAC and the Union Plaintiffs purport to bring a claim on their own behalf separately from claims on behalf of their members, they have not alleged that they as entities -- as opposed to as representatives of their members -- have been the victims of any violations of federal law. The Complaint is utterly devoid of any allegations that SEBAC or the Union Plaintiffs have been injured by the defendants' conduct. For example, although the Complaint generally states that SEBAC and the Union Plaintiffs have been "penalized" for exercising First Amendment rights (e.g., Complaint, Third Count, ¶ 85), there is no allegation as to

what penalty was imposed. In the absence of any allegation of harm suffered a result of allegedly unconstitutional conduct, the claim must fail. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (organization must have suffered an "injury in fact - an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" in order to have standing); American Charities for Reasonable Fundraising Regulation v. Shiffrin, 46 F. Supp. 2d 143 (D. Conn. 1999) (following Lujan and Second Circuit law above for § 1983 claim). Because SEBAC and the Union Plaintiffs fail to assert sufficient allegations for standing, their claims in Counts Three and Four should be dismissed.[16]

I. The Ninth Count Must Be Dismissed Because There Is No Substantive Due Process Violation

In the Ninth Count, the Named Plaintiffs and the Union Members Class claim that their substantive due process rights have been violated.[17] However, once again, these plaintiffs have

[16] Upon dismissal of SEBAC's claims in Counts Three and Four, the claims by the purported SEBAC Class in those counts should similarly be dismissed, for lack of class representative. See note 14, above.

[17] To the extent the plaintiffs also refer in Counts Nine and Ten to the Equal Protection clause of the Fourteenth Amendment, they have failed to state a valid claim, given that they attempt to allege that their status as union employees was the basis of the layoff decisions, yet they also allege, as they must, that one union was not impacted at all by the layoffs. (Complaint, ¶¶ 52, 60, 70, 88 (Count Nine), 84 (Count Ten).) Accordingly, the plaintiffs' own allegations are self-defeating under the Equal Protection clause. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

failed to state a cause of action because they have no “property” interest, as is required to establish such a claim; therefore, Count Nine must be dismissed.

As an initial matter, because they have alleged other violations of the Constitution, their substantive due process claims should not be allowed to continue. As the Supreme Court has held, "[w]here a particular Amendment [to the Constitution] 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of “substantive due process”, must be the guide for analyzing these claims.'" Albright v. Oliver, 510 U.S. 266, 273 (1994) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

Nevertheless, substantive due process is "an area of the law famous for its controversy, and not known for its simplicity." Schaper v. City of Huntsville, 813 F.2d 709, 716 (5th Cir. 1987). Substantive due process circumscribes an "outer limit" on permissible governmental action. Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999). Such rights are violated only by conduct "so outrageously arbitrary as to constitute a gross abuse of governmental authority." Natale, 170 F.3d at 263. To state a due process violation, a plaintiff must first show a deprivation of a constitutionally protected property or liberty interest. White Plains Towing Corp. v. Patterson, 991 F.2d 1049, 1061-62 (2d Cir. 1993); Costello v. McEnery, No. 91 Civ. 3475, 1994 U.S. Dist. LEXIS 10778 at *11 (S.D.N.Y. Aug. 3, 1994), aff'd, 57 F.3d 1064 (2d Cir. 1995). It is only when such a right is established that the court may turn to a discussion of whether there has been a

deprivation of that right without due process. While state law may define the interest sought to be protected, federal law determines whether an interest rises to the level of an "entitlement" implicating the protections of the Due Process Clause. Ezekwo v. New York City Health & Hosp. Corp., 940 F.2d 775, 782 (2d Cir. 1991).

The Supreme Court has recently reiterated that "in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated." County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998). Here, the Named Plaintiffs and the Union Members Class have failed to identify any legally recognizable federal liberty or property right. The only right that they seem to allege in the Ninth Count is an amorphous right to be free from undue economic pressure for "asserting their rights under the SEBAC Agreement." (Ninth Count, ¶¶ 89, 91.) In other words, the Named Plaintiffs and Union Members Class appear to be asserting that they have a right not to be subjected to pressure from the defendants to agree to changes to the terms of the SEBAC Agreement. The source of this purported right, however, is not identified, and no provision of state or federal law prohibits hard bargaining between a state and its unionized employees.

To the extent that the Named Plaintiffs and Union Members Class seek to rely on provisions of Connecticut law to support their claims (as they appear to do throughout, by stating that they have "statutorily-protected rights" under Conn. Gen. Stat. § 5-278(b) (e.g., Count Nine, ¶ 85)), such reliance is misplaced. "[T]he due process clause does not require, or even permit,

federal courts to enforce the substantive promises in state laws and regulations. . . . [Moreover, if] a state's violation of its own laws and regulations does not violate the due process clause, it is hard to see how failure to keep a promise contained in a contract can violate the due process clause." Mid-American Waste Sys., Inc. v. Gary, 49 F.3d 286, 290 (7th Cir. 1995). Litigants who contend that a state actor has violated state law or broken a contract must present their claims to state court. See Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 106 (1984) ("[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.").

Accordingly, Named Plaintiffs and the Union Members Class have alleged no viable basis for the asserted property right, and, therefore, this Court must dismiss the Ninth Count.

J. The Tenth Count, Which Also Purports To State A Substantive Due Process Claim, Must Be Dismissed

In the Tenth Count, the Named Plaintiffs and the Union Members Class purport to state another claim that their substantive due process rights have been violated by the defendants. Specifically, the plaintiffs allege that they have a "statutorily-protected right to continued state employment." (Count 10, ¶ 82.) This claim fails because they do not have a "property" interest or entitlement to a state job, nor do they have a "property" right not to be laid off.

As noted above in Section I, the first step in the substantive due process analysis is whether a property right exists. This inquiry is governed by federal law, which determines whether an

interest is an "entitlement" so as to trigger application of the Due Process Clause. Ezekwo, 940 F.2d at 782. "It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a [state actor] into a federal claim." Id. "[T]he existence of provisions that retain for the state significant discretionary authority over the bestowal or continuation of a government benefit suggests that the recipients of such benefits have no entitlement to them." Plaza Health Labs v. Perales, 878 F.2d 577 (2d Cir. 1989); Petrario v. Cutler 187 F. Supp. 2d 26, 34-35 (D. Conn. 2002) (no property right to be promoted or not to be furloughed, where plaintiff is public employee covered by collective bargaining agreement with University of Connecticut Health Center); see also RR Village Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987) (distinguishing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) ("[when state law] makes the pertinent official action discretionary, one's interest … does not rise to the level of a property right entitled to procedural due process")).

Here, each of the applicable collective bargaining agreements contains provisions that give the state the express power to conduct layoffs and other employment decisions as to the state's union employees. Indeed, as noted previously, the applicable collective bargaining agreements provide for significant discretion on the part of the state of Connecticut, such as:

> [R]eserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of public management. Such rights include but are not limited to … determining the mission of an agency and the methods and means necessary to fulfill that mission, including the contracting out of or the discontinuation of services, positions or programs in whole or in part; … the suspension, demotion, discharge or any other appropriate action against its

> employees; [and] the relief from duty of its employees because of lack of work or for other legitimate reasons.

(E.g., Collective Bargaining Agreement between State and CEUI for Maintenance and Service Unit (NP-2), Art. 5, Sec. 1, copy attached as Ex. D.) Thus, based on the collective bargaining agreements, Connecticut public employees have no "property" interest that they will not be laid off.[18] See Shegog v. Board of Educ., 99 C 211, 2000 U.S. Dist. LEXIS 6099 (N.D. Ill., May 1, 2000) (no property right not to be laid off); see also Cibas v. Lockwood, et al., No. Civ. 90-341, 1994 U.S. Dist. LEXIS 21452, *79 (D.N.M. 1994) (finding no substantive due process violation and holding that "[a]bsent some infringement of some 'fundamental' right, it would appear that the termination of public employment does not constitute a denial of substantive due process").[19]

In other states, public employees have also tried to have courts rescind state layoffs, without success. For example, in Mandel v. Allen, 889 F. Supp. 857 (E.D. Va. 1995), aff'd, 81 F.3d 478 (4th Cir. 1996), Virginia's Governor and several other state executives, were sued by state employees whose jobs were either abolished or reclassified as part of a reorganization of the state government. The Mandel court recognized that the state employees could not have a

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[18] This Court need not decide whether public employees have a "property" right to a state job, in general, because of the narrow issue involved – namely, whether the state can conduct layoffs in accordance with the applicable collective bargaining agreements.

[19] The plaintiffs' apparent attempt to use the applicable collective bargaining agreements as a shield from layoffs is misguided: "Where the [employee] received the benefits of the collective bargaining contract, he must also accept its disadvantages, i.e., he must, so to speak, accept the bitter with the sweet." Morris v. Lindau, 196 F.3d 102 (2d Cir. 1999).

legitimate expectation that their positions would never be abolished, and upheld the need for the government to retain the flexibility necessary to effect a bona fide reorganization of state resources. Mandel, 889 F. Supp. at 866. "Public offices are created to meet the needs of the people, and when such need ceases to exist, there is no obligation or necessity to continue a useless office. The determination that a position should be abolished for reasons of efficiency and economy is solely within the judgment and discretion of the governing authority in whom the power to eliminate the office is vested." Id. Similarly here, and as discussed above, the Governor is entrusted with the authority to make such budgetary decisions and is expressly authorized by the collective bargaining agreements to undertake layoffs. Accordingly, this Court should dismiss Count Ten.

V.
CONCLUSION

For all of the foregoing reasons, this Court should refuse the plaintiffs' invitation to involve itself in political battles and to substitute its own judgment for the policy decisions made by the Governor and the Secretary pursuant to their constitutional and statutory authority. This Court should grant defendants' Motion to Dismiss.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing was mailed this date, postage prepaid, to: David S. Golub, Silver, Golub & Teitell, LLP, 184 Atlantic Street, P.O. Box 389, Stamford, CT 06904.

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